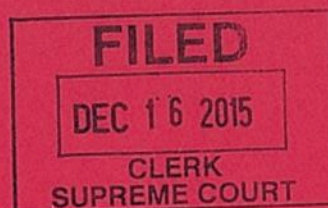


**Commonwealth of Kentucky**  
**Supreme Court**  
No. 2015-SC-000021-DG



(Court of Appeals No. 2012-CA-001828-MR)

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Monroe Circuit Court  
Hon. Eddie Lovelace, Judge  
Indictment No. 10-CR-00118

RITA MITCHELL

APPELLEE

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**Brief for Commonwealth**

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Submitted by,

**JACK CONWAY**

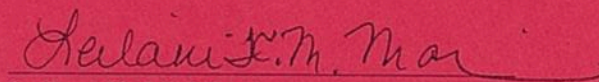
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court on this, the 16<sup>th</sup> of December 2015, and that a copy of the Brief for Commonwealth has been served as follows: by mailing to the trial judge, Hon. David L. Williams, Circuit Judge, 112 Courthouse Square, P.O. Box 660, Burkesville, KY, 42717; by state messenger service to Hon. Roy A. Durham II, Assistant Public Advocate, 200 Fair Oaks Lane, Suite 500, Frankfort, KY, 40601; and by sending electronic mail to Hon. Jesse Stockton, Commonwealth Attorney.

  
Leilani K. M. Martin  
Assistant Attorney General

## **INTRODUCTION**

Appellee was convicted of Assault in the First Degree and Criminal Abuse in the Second Degree. The Court of Appeals reversed her conviction for Assault in the First Degree and affirmed her conviction for Criminal Abuse in the Second Degree. This Court granted the Commonwealth's motion for discretionary review as to the issue of whether the Court of Appeals erred as a matter of law when it determined that Appellee had no legal duty to the victim in her actual custody.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.



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## STATEMENT OF THE CASE

Appellee was indicted for assault in the first degree and criminal abuse in the first degree on December 15, 2010. (TR I, 1-2). The charges involved assault and abuse on Calvin Bartley ("Calvin"), the severely disabled adult son of Appellee's co-defendant, Donna Bartley ("Donna"). (VR 9/12/11; 3:34:10-3:35:15). Appellee's case was ordered consolidated for trial with Donna's on April 20, 2011, because the same evidence would be presented in each case. (TR I, 73).

The trial occurred September 12-13, 2011. Appellee was convicted of assault in the first degree and criminal abuse in the second degree. (VR 9/13/11; 6:47:09-6:47:54). On October 19, 2011, consistent with the jury's verdict, she received a sentence of twelve (12) years for assault and five (5) years for criminal abuse, to run consecutively, for a total term of seventeen years imprisonment. (TR II, 207-212). Her co-defendant, Donna, was convicted of assault in the first degree and criminal abuse in the first degree, for which the jury assessed a punishment of twenty (20) years and ten (10) years, respectively, to run consecutively for a total sentence of thirty (30) years imprisonment. (VR 9/13/11; 6:47:55-6:48:36; 7:54:57-7:56:00).

Donna appealed her case to the Supreme Court of Kentucky, which affirmed her convictions in Bartley v. Commonwealth, 400 S.W.3d 714 (Ky. 2013). Appellee appealed her case to the Court of Appeals of Kentucky, which affirmed her conviction for Criminal Abuse in the Second Degree and reversed her conviction for Assault in the First Degree on the basis that she had no legal duty of care to Calvin in its unpublished opinion, Mitchell v. Commonwealth, 2014 WL 7205985. (Appendix, 1)

At trial, Appellee took the stand. She testified that she had been friends with Donna for thirty-seven (37) years and she had lived with Donna and Donna's three (3) children for seventeen (17) years, but since June or July 2010, had lived there with just Calvin. (VR 9/13/11; 2:08:45-2:09:40). Appellee testified that she was close to Donna Bartley's children, and that she had taken care of Calvin for most of his life. (VR 9/13/11; 2:16:10-2:16:37). Evidence established that Calvin was found living alone with the Appellant. (VR 9/12/11; 1:55:28-2:01:25). Appellee specifically testified that Calvin had lived with only her between June/July 2010 through October, 20, 2010. (VR 9/13/11; 2:08:45-2:09:37). A radio was deliberately set to blaring, according to the Appellee, to cover up Calvin's screams. (VR 9/12/11; 2:17:50-2:18:20).

Appellee stated that Donna came back to visit once or twice per week, to bring food and water, as the water had been cut off, and that when Donna came by, the house was "pretty much" in the condition it was in on October 20, 2010, but had gotten a little worse a little bit before the authorities came. (VR 9/13/11; 2:13:00-2:14:00). Appellee testified that she feared that Calvin would be taken away, so she never called for help. She did not get paid for staying there with Calvin. Appellee described herself as severely depressed at the time, with COPD, and relied upon regular use of oxygen. (VR 9/13/11; 2:14:05-2:15:35). She testified that she tried to take care of Calvin, and was shocked to see pictures of how he looked when people came to investigate and take Calvin. (9/13/11; 2:17:20-2:18:38). Appellee testified that looking back, she should have called for help. (VR 9/13/11; 2:21:05-2:21:55).

Appellee testified that she was afraid of Donna “in a way,” and depended on her for food, clothing and her existence. (VR 9/13/11; 2:22:10-2:22:30). She said that Donna would pick up her disability check from the residence. (VR 9/13/11; 2:15:40; 2:22:55). Appellee said that Donna knew the water was off from August through October 2010. (VR 9/13/11; 2:23:45-2:24:07). She testified that Donna was there weekly, sometimes not the whole weekend, and sometimes did not check on Calvin when she came. (VR 9/13/11; 2:25:04-2:25:40). She said Donna last saw Calvin a couple of weeks before the officials came and Calvin was taken, and that Calvin had only been in his waste for two weeks. (VR 9/13/11; 2:25:40-2:26:15). She also testified that Calvin had loose skin and that the room had not been cleaned for only a couple of weeks. (VR 9/13/11; 2:27:40; 2:29:25). Appellee testified that Donna had talked with her about getting the trailer moved so that Donna could be with Calvin, and Donna had also called nursing homes. (VR 9/13/11; 2:30:15-2:31:00).

Appellee testified that Donna called her on Appellee’s cell phone while the police were there, and told her not to let anybody inside, and that Appellee did not know why. (VR 9/13/11; 2:53:43). Appellee also testified that Donna did not tell her what to tell the police. (VR 9/13/11; 2:56:00). Appellee continued to maintain that the terrible condition of the residence occurred in only the two (2) weeks prior to its discovery by police. (VR 9/13/11; 2:58:10-2:58:17).

The Court of Appeals’s Mitchell opinion cited from this Court’s Bartley opinion to relay the facts of the case:

[F]or several years prior to the spring of 2010, Bartley, Mitchell and Bartley's three children lived together in Bartley's mobile home on Mudlick Flippin Road in Tompkinsville. Mitchell, a recipient of social security disability income benefits, testified that in exchange for her food and lodging she helped care for Bartley's children and the home and allowed Bartley to take control of her social security checks. In particular, she helped cared for [Kalvin], Bartley's eldest child, who, as a result of cerebral palsy, mental retardation, and possibly autism, is severely disabled.

In the late spring or early summer of 2010, Bartley and her two younger children, teenagers at the time, moved from the Tompkinsville mobile home to a new home in Glasgow. Mitchell (who herself suffers from chronic obstructive pulmonary disease and depression) and the then twenty-four year old [Kalvin] remained in Tompkinsville. The plan, apparently, was to have the mobile home moved to Glasgow near to where the others were living, but for whatever reason that move did not occur. Instead, Bartley increasingly disassociated herself from her son and Mitchell and from their circumstances. Although she remained in control of the purse strings, including Mitchell's and [Kalvin's] social security benefits, she ceased to provide for trash removal; ceased to pay for water service, which in August 2010 was discontinued; and visited the mobile home only on weekends, delivering food and a few gallons of water. Bartley apparently ignored the deplorable and worsening conditions in which her son and Mitchell were living.

Matters came to a head in October 2010. By then the mortgagee bank was contemplating foreclosure on the mobile home. A bank representative sent to inspect the property found his attempts thwarted by a large number of stray dogs gathered in the yard. Concerned by the dogs, by a bad smell pervading the area (perceptible as far as 100 feet from the door), and by statements from neighbors that a boy was being kept inside the premises, the inspector reported the situation to the Monroe County Sheriff's office. Soon thereafter, a deputy sheriff, assisted by a social worker from the local Cabinet for Family and Health Services office, entered the home with Mitchell's consent. They immediately encountered an almost unbearable stench, arising, at least in part, from the numerous dogs



milling about and their excrement, which had been allowed to accumulate on the floors and the furniture. Mitchell told them that [Kalvin] was in the home.

The deputy sheriff and social worker then summoned emergency medical assistance, and when the E.M.S. workers arrived, they all proceeded to a back bedroom, locked from the outside, where they found [Kalvin]. Photographs they took graphically confirmed that amid heaps of snack wrappers, food scraps, and empty soft drink cans, [Kalvin] was lying naked on a mattress, which was covered with nothing but a sheet of plastic. Through long use, apparently, the center of the mattress had become hollowed out, and in the depression where [Kalvin] was lying was a puddle, inches deep, of his own urine and feces....

Several of the medical personnel who [later] treated [Kalvin] also testified, including the nurses who bathed him and fed him during his two week hospital stay. The nurses described [Kalvin] as having been covered in feces literally from head to toe. They washed it from his hair, from the length of his body, and from his feet. It was caked behind his long fingernails; and it was on his teeth. The foul odor clung to him for many days as did the stain upon his skin. It was also several days before [Kalvin] could resume normal eating. He had arrived at the hospital very hungry, but when the nurses fed him ordinary food, he vomited. Consequently, for several days, he was given baby food while his digestive system recovered.

The physician who treated him testified that [Kalvin's] digestive problem, apparently from the result, in part at least, of a gas blockage in the small bowel, was serious and could have been fatal, had it not been treated. Likewise, [Kalvin's] contact with his feces, particularly the feces in his mouth, had exposed him to a very serious risk of bacterial, especially E-coli, infection and sepsis, which is potentially fatal.

In addition to having been exposed to those potentially grave conditions, [Kalvin] had also suffered, according to the doctor, a number of lesser, but significant injuries. His skin had developed bed sores and papules - raised red dots - that [Kalvin] had scratched open. His skin had also sagged and wrinkled due to his extreme weight loss. More seriously, [Kalvin's] left clavicle had become

displaced and his left shoulder had collapsed inward, a result, the doctor believed, of his having lain too long and too uninterruptedly on that side. His muscles had atrophied to the point that he had lost much of his mobility; only months later would he finally regain the ability to walk. He had become deficient in several vitamins, including the fat soluble vitamins A and D. His teeth, too, were severely decayed, and indeed, all were removed within a year of his release from the hospital. Asked whether [Kalvin's] condition could have developed in the two weeks immediately prior to his rescue, the doctor explained that it could not have. The shoulder collapse, the muscle atrophy, and the vitamin A and D deficiencies all required several weeks if not months to develop. Months, too, were necessary for the growth of [Kalvin's] inches-long fingernails and toenails.

Mitchell, at 2-5; Bartley, at 716-7.

Additional facts will be developed below as necessary.

### **ARGUMENT**

Appellee was convicted of Assault in the First Degree and Criminal Abuse in the Second Degree. The Court of Appeals reversed her conviction for Assault in the First Degree and affirmed her conviction for Criminal Abuse in the Second Degree. This Court granted the Commonwealth's motion for discretionary review as to the issue of whether the Court of Appeals erred as a matter of law

The Commonwealth presented two (2) questions to this Court; but in truth, they are a parsing out of one principal question, which is whether the Court of Appeals erred in determining, as a matter of law, that Appellee had no duty of care to Calvin as required for her conviction for Assault in the First Degree to be upheld. The second is whether the Court of Appeals erred by then being inconsistent when it then conversely upheld

Appellee's conviction for Criminal Abuse in the Second Degree in spite of its determination on Appellee's conviction for Assault in the First Degree.

I.

**THE COURT OF APPEALS ERRED IN DETERMINING  
THAT APPELLEE DID NOT OWE ANY DUTY OF  
CARE TO KALVIN AND THEREFORE COULD NOT  
BE CONVICTED OF ASSAULT IN THE FIRST  
DEGREE**

The Commonwealth respectfully submits, as a preliminary matter, that the Court of Appeals should not have considered the issue of duty as it was not argued by Appellee before the trial court. However, the Commonwealth recognizes that this is the question before this Court, and does not mean to shirk from that analysis, but rather provides argument for both below.

**A. The Court of Appeals erred in considering the unpreserved issue of duty**

In denying Appellee's directed verdict motion, the trial judge stated that no act was necessary for assault, that the victim had been kept at the residence, and that ample testimony had been provided regarding serious physical injury. (VR 9/13/11; 1:54:57-1:58:29; 1:59:44-2:00:10). The trial judge did not address the matter of duty.

Appellee briefly renewed her directed verdict motion at the close of all proof, which the judge overruled. The issue of duty was not mentioned. (VR 9/13/11; 2:59:54-3:00:30).

With no ruling on the issue of whether she owed a duty to Calvin, the issue was simply not preserved for appellate review by the directed verdict motion. "[I]t is the duty of one who moves the trial court for relief to insist upon a ruling, and failure to do so is

regarded as a waiver.’ Dillard v. Commonwealth, 995 S.W.2d 366, 371 (Ky. 1999) (citing Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994), Wilkey v. Commonwealth, 452 S.W.2d 420, 422 (Ky. 1970)).” Hannah v. Commonwealth, 306 S.W.3d 509, 516-517 (Ky. 2010). Since the trial judge did not rule on the issue of duty and since the Appellee did not pursue a ruling on the matter, it is waived and unpreserved. Therefore, the Court of Appeals should not have based its decision upon this determination.

**B. Regardless of the issue of preservation, Appellee owed a duty to Calvin**

The uncontroverted facts of are that Appellee had voluntarily provided ongoing care for Calvin, in addition to two (2) other minors born of Donna, for the seventeen (17) years prior to being charged; Calvin would have been seven (7) years old when Appellee became his primary caregiver. Appellee’s depression and COPD did not prevent her from providing this daily care for those prior years. Additionally, it is uncontroverted that Appellee was the only other person living with Calvin the summer of 2010.

The Commonwealth appreciates that the Court of Appeals perceived Appellee as a sympathetic defendant, but the Court of Appeals nevertheless erred when it recast her role as one of simply a bystander. The key differences between Appellee and Calvin, aside from the obvious mental and physical impairments unique to Calvin, were that Appellee had access to regular food and water that Donna brought over, whereas Calvin was found to be starving, Appellee was ambulatory, whereas Calvin was locked into a room by Appellee from the outside. Appellee was not forced to lie immobile in a pool of her own waste, whereas Calvin had been forced to continuously repose - in one unremitting position - in a pool of his own waste with a collapsed clavicle. Appellee had unimpeded access to a cell phone - which she used with practiced alacrity in front of the police -

demonstrating that she could have called emergency services at any time, whereas Calvin's screams were deliberately drowned out by Appellee's turning on a radio at top volume. And while there was no running water to the property, the electricity clearly worked to power the devices that Appellee desired to use. Appellee was therefore clearly not like Calvin, as she had the freedom to move around, the freedom to go to her own mailbox and get her social security disability check before Donna came for her weekend visits, the freedom to make phone calls and make new living arrangements for herself and was in no way helplessly reliant upon Donna as was Calvin upon Appellee. (VR 9/12/11; 3:41:27-3:45:29)

Most tellingly, Appellee advised the police and also testified at trial that she did not "call" anyone because she was afraid Calvin would be taken from them, and that she was voluntarily alone with Calvin as his only caretaker the summer of 2010. (VR 9/12/11; 3:56:13-3:58:25) This demonstrates again that Appellee was aware that a phone call was all that was required to save Calvin from his horrible conditions, that she was singularly situated to do so due to his isolation and dependence, and yet chose not to make that call. (VR 9/12/11; 3:56:13-3:58:25; VR 9/13/11; 2:14:05-2:14:24; 2:21:55)

However, the fact of Appellee's own deliberate degraded quality of life has nothing to do with whether or not Appellee had voluntarily undertaken the role of Calvin's caretaker, and the fact that Calvin was mercilessly victimized by Appellee. That Appellee suffered from depression and COPD was presented to the jury, and evidently, she was not so impaired by her long-existing conditions that she was able to proffer it as a type of affirmative defense. Perhaps it was as simple as Appellee was depressed and did not care that she was living in filth. Perhaps the jury, after observing Appellee's demeanor and



testimony throughout the trial and during her time on the stand, determined that she had a lack of credibility about her level of depression. While choosing to live the way that Appellee did is bizarre and inexplicable, there is no prohibition to her choosing to live that way, but there is a prohibition to her forcing Calvin to live that way with her.

Again, Appellee took on the role of Calvin's caretaker seventeen (17) years prior, when she first moved in with Donna and her children and began providing primary care for all of them, not at a point in time narrowly preceding the inception of this case. The evidence shows that Calvin needed daily care, which Appellee had readily provided in the past, that Appellee knew that Calvin required daily care, and that Appellee further understood that Donna's weekly or fortnightly visits were not sufficient to maintain Calvin's daily care needs. There was no evidence that Appellee could not make a phone call or was not able to provide care to Calvin. There was evidence that Appellee chose not to, and also chose not to make Calvin's situation known to others.

The Court of Appeals relied heavily on West v. Commonwealth, 935 S.W. 2d 315 (Ky.App.1996) - a case that held that reckless homicide convictions were supported against a man and his wife who were found guilty of breaching their duty to the mans' disabled sister - and then the Court of Appeals determined that it did "not believe that [Appellee] owed a duty to [Calvin] as a matter of law and that [Appellee] was entitled to a directed verdict of acquittal upon first degree assault," and that Appellee's assault charge required the Commonwealth to prove a failure to fulfill a legal duty in lieu of proving an overt act by Appellee. (Appendix 1, page 9)

The Court of Appeals supported its decision by citing the following evidence, “[Appellee] in no way attempted to seclude [Kalvin] from [Donna] Bartley. Moreover, the evidence revealed that Bartley controlled [Appellee’s] only financial resource, her social security disability [for depression and COPD], and left her completely destitute and without even the most basic necessities, such as running water.” (Id. at 10)

However, even the West decision concluded that the defendant had a legal duty of care for his impaired sister, when he assumed such care for a period of approximately ten (10) years. Id. at 316. The West decision stated that the defendant, “met the last of the [Jones v. United States, 308 F.2d. 307 (D.C.Cir.1962)] tests; particularly aptly in voluntarily accepting responsibility for [the victim’s] care and thereafter isolating her from contacts that might have resulted in her aid or assistance. Id. at 317.

Pursuant to KRS 209.020(6), “Caretaker” means an individual or institution who has been entrusted with or who has the responsibility for the care of the adult as a result of a family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, employment, legal duty, or agreement.

Pursuant to KRS 501.030, “Criminal Liability,” A person is not guilty of a criminal offense unless: (1) He has engaged in conduct which includes a voluntary act or the omission to perform a duty which the law imposes upon him and which he is physically capable of performing; and (2) He has engaged in such conduct intentionally, knowingly, wantonly, or recklessly as the law may require, with respect to each element of the offense, except that this requirement does not apply to any offense which imposes absolute liability, as defined in KRS 501.050.

In Staples v. Commonwealth, 454 S.W. 3d 803 (Ky. 2014), this Court considered whether convictions of Manslaughter in the First Degree and Criminal Abuse in the First Degree should be upheld when the defendant was the live in boyfriend of the parent, was not the legal custodian of the child, and had not legally attained *in loco parentis* status. The defendant's position is that he had no legal duty to the child, and this Court determined that the defendant did have "actual custody" of the child, and therefore also possessed a concomitant legal duty not to permit the child to be abused by anyone, including the defendant himself, as well as the child's parent. Id. at 813.

To this end, this Court stated, "as the traditional household of two biological parents residing with their minor children becomes increasingly less common, imposition of criminal responsibility for breach of a duty of care by an "actual custodian" is not only entirely logical but the plain intent of our legislators." Id. at 807.

Pursuant to Staples, at 813, (*internal citation omitted*), the relationship of the nonparent to the parent is not determinative upon the issue of legal duty, but rather the relationship of the nonparent to the child:

The common law also recognizes that some persons, often but not necessarily stepparents, can assume an *in loco parentis* relationship with someone else's child on a permanent, or at least indefinite basis. The law has traditionally recognized such a relationship only where the nonparent "has put himself in situation of lawful parent by assuming *all* the obligations incident to parental relationship and ...[has] actually discharge[d] those obligations

Id. at 814. The opinion went on further to state:

[The General Assembly's] intent in choosing "actual custody," we believe, could only have been to bring within the duty to act provisions those persons whose relationship with a child, while perhaps not one of the aforementioned

legal relationships, is nevertheless close and substantial enough to warrant society's expectation that he or she will not stand idly by and knowingly allow the child to be abused or killed.

Id. at 816.

The jury gave vastly disparate sentence recommendations for Appellee and Donna, who was Calvin's mother; with a recommendation of seventeen (17) years for Appellee and thirty (30) years for Donna. The difference in the jury's sentence recommendations can be attributed to Appellee being a more sympathetic defendant than Donna. However, the issue of whether or not Appellee was a sympathetic defendant has nothing to do with whether or not she met the statutory definition of an adult caretaker, with its concomitant duty of care. Further, Appellee's depression, whether it was in an exacerbated state while she was the sole caregiver of Calvin or not, apparently did not arise to the level of preventing her from engaging in her own self serving activities to seclude Calvin from discovery, and the inference that her impairment was therefore not of the gross nature that she purported it to be in her testimony.

Appellee admitted to the police that she kept a radio "blasting" to hide Calvin's screams for help, and yet Appellee was able to ensure that she had available use of oxygen tanks for her own COPD. Appellee ensured that she remained nourished with the supplies that Donna brought. Appellee testified that Donna brought these supplies regularly. Appellee had a cell phone at her disposal. Appellee admitted that she had provided all the day to day physical care for Calvin that would be expected from a parent for seventeen (17) years prior, and that she had voluntarily assumed these responsibilities from their

inception. Appellee admitted that she voluntarily remained with Calvin at the residence alone during the summer of 2010, after Donna moved out. Under the Staples analysis, she has a legal duty of care to Calvin by having assumed such parental responsibilities and also by being *in loco parentis*.

## II

### **THE COURT OF APPEALS WAS INCONCISTENT WHEN IT AFFIRMED APPELLEE'S CONVICTION FOR CRIMINAL ABUSE IN THE SECOND DEGREE, AND YET VACATED APPELLEE'S CONVICTION FOR ASSAULT IN THE FIRST**

The basis of the Commonwealth's argument here is that the Court of Appeals vacated Appellee's conviction for Assault in the First Degree by determining that she did not possess a legal duty of care to Calvin, but then affirmed her conviction for Criminal Abuse in the Second Degree by determining that she had "actual custody."

If Appellee has the duty of care imparted to those with actual custody of a child for her criminal abuse charge; it is disingenuous to then declare that she has no legal duty of care at all to the same child for her assault charge. Therefore, it is inconsistent for the Court of Appeals to affirm Appellee's conviction on Criminal Abuse in the Second Degree, which requires a finding that Appellee had actual custody of Calvin, but then determine that Appellee should be granted a directed verdict on her Assault in the First Degree charge because she had no legal duty of care to Calvin.

Clearly, Appellee had actual custody of Calvin for the majority of the time during the summer of 2010, as Donna's visits were at most, once a week. Actual custody of Calvin imbued Appellee with a duty of care towards him to not stand idly by for illegal or



abusive activity to ensue. For the Court of Appeals to find that Appellee did not have a legal duty of care for her Assault in the First Degree charge is a wayward result that should be resolved to find that she did have a legal duty of care to Calvin in light of the guidance found in Staples, as it is precisely on point.

### **CONCLUSION**

For all of the foregoing reasons, this Court should dismiss Appellee's appeal and affirm his convictions.

Respectfully Submitted

**JACK CONWAY**

Attorney General of Kentucky

A handwritten signature in cursive script, appearing to read "Leilani K. M. Martin", with a long horizontal flourish extending to the right.

**Leilani K. M. Martin**

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